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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY OF BURBANK; AND DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

BURBANK POLICE DEPARTMENT; CITY OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 16 FOR AN ORDER EXCLUDING EVIDENCE OR ARGUMENT OF SPECIFIC COMMENTS FOR WHICH PLAINTIFF GUILLEN HAS NOT LAID A FOUNDATION

TRIAL:

DATE: April 25, 2011
TIME: 9:00 a.m.
DEPT: 37

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its massive Motion in Limine No. 16, Defendant seeks to exclude evidence or argument of specific comments for which Plaintiff Guillen has not laid a foundation, merely duplicating the same argument from Defendant's previously-denied Motion in Limine No. 3. Defendant mistakenly assumes that foundation for every piece of evidence should have been presented by Plaintiff *prior* to trial (i.e. in Plaintiff's opposition to summary judgment motion) or it should be excluded at trial. The instant motion is severely flawed for three reasons: (1) a motion in limine and a motion for summary judgment serve two different purposes and have no bearing on one another; (2) Defendant admits that if plaintiff can provide foundation at trial the evidence it wishes to exclude here is admissible, so granting the instant motion would be meaningless[1]; and (3) Defendant does not state any specific prejudice that would result from the presentation of evidence discussed in its motion.

Plaintiff recognizes that she cannot introduce evidence for which she has no foundation. See Evidence Code § 402, 403. Nevertheless, Defendant seeks to improperly preempt various pieces of evidence prior to trial ***if*** Plaintiff cannot provide the proper foundation at trial.[2] Logically, the proper place to make such evidentiary objections is ***at*** trial, ***if*** Plaintiff has not provided sufficient foundation at that time. As the Court stated in *Kelly v. New West Federal Savings*, (1996) 49 Cal. App. 4th 659, 671 (quoting *People v. Jennings* (1988) 46 Cal. 3d 963, 975, fn. 3): "'Until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.'" Like Motion in Limine No. 3, this motion merely restates applicable law, a wholly improper use of a motion in limine,. Further, and as

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[1]Further, specific conduct which Guillen did not know about prior to discovery can be used to show motive or intent on behalf of the Defendant.

[2]See, for example, Motion p. 2: "***If Guillen has not provided a sufficient foundation for a particular comment or incident,*** that comment should not be admitted at trial." (Emphasis in original). See also Motion p. 3: "***If*** Guillen cannot provide a first hand account of a witness...then the comment must be excluded."(Emphasis added) ; Motion p. 7: "***If*** Guillen does not provide essential information... Burbank cannot effectively cross-exam (sic) Guillen." (Emphasis added); Motion pp. 10 "***Unless*** Guillen can establish at trial that she was personally aware of these comments... the Court should exclude these comments at trial." (Emphasis added).

discussed in more detail below, Defendant misstates the law as to what constitutes a proper foundation. Therefore, as this motion in limine serves as no guidance whatsoever to the Court or the parties the Court should deny this motion in full.

II. A MOTION IN LIMINE AND A MOTION FOR SUMMARY JUDGMENT SERVE TWO DIFFERENT PURPOSES

Motions in limine and motions for summary adjudication have different purposes. The nature, relief and law governing the two types of motions are separate and distinct. A motion in limine is a motion at the threshold of trial to exclude specific evidence that is inadmissible and prejudicial. (*People v. Morris* (1991) 53 Cal.3d 152, 188.) Motions in limine should be used to exclude evidence which could be objected to at trial as irrelevant or unduly prejudicial. (*Clemens v. American Warranty* (1987) 193 Cal.App.3d 444, 451.) Of utmost importance, the granting of a motion in limine which prevents a party from offering evidence to establish its case is prejudicial error that is reversible per se. (*Kelly*, supra, 49 Cal. App.4th at 677.)

On the other hand, the purpose of a motion for summary adjudication is to discover whether there are triable issues of fact, or whether the case can be decided as a matter of law. (*Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70.) A motion for summary judgment simply has nothing to do with objections at trial, because its purpose is to avoid trial. (See *Stationers Corp. v. Dunn & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417).

Nevertheless, Defendant argues that a foundation objection sustained during summary judgment should automatically preclude, by way of motion in limine, any such evidence from being presented at trial. (Motion p. 8:10-10:17) However, Defendant's notion assumes that if Plaintiff could not lay a proper foundation in her MSJ Opposition she cannot rectify the foundation issue through witnesses at trial. The purpose of an MSJ opposition is not to present every single shred of evidence to the Court – only that evidence which shows at least one triable issue. Further, a closer look at Defendant's evidentiary objections to Plaintiff's MSJ evidence (Exhibit B to Defendant's motion) shows that Defendant objected to each item of evidence on multiple grounds, and the Court never specified that it was sustaining each objection on foundational grounds only. Finally, and as is discussed below, Defendant admits that the evidence it objected to is admissible if Plaintiff provides

the proper foundation at trial.

As in *Kelly v. New West Federal Savings*, supra., the motion filed by the Defendant is premature, and seeks a ruling which would be declaratory of existing law regarding foundation of evidence. Such a ruling would not provide any meaningful guidance to the parties or witnesses. Therefore, this Motion should be denied in full.

III. DEFENDANT ADMITS THAT IF PLAINTIFF CAN PROVIDE FOUNDATION AT TRIAL THE EVIDENCE IS ADMISSIBLE, THE INSTANT MOTION IS PREMATURE

The "usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissable and prejudicial by the moving party." (Kelly, supra, 49 Cal.App.4th at 669 (emphasis in original).) In complete contravention to Kelly, Defendant has failed in its motion in limine to provide any factual support or argument as to why, *prior* to trial, Plaintiff should be excluded from laying a foundation and/or presenting evidence *at* trial. The Defendant clearly agrees: "if Guillen has not provided a sufficient foundation for a particular comment or incident, that comment or incident should not be admitted at trial." Motion p. 2:16-17. The converse is also true: if Guillen *provides* a sufficient foundation for a particular comment or incident, that comment or incident should be admitted at trial. Therefore, ruling on evidence to be offered by the Plaintiff for lack of foundation is entirely premature at this stage and this motion should be denied on that ground alone.

A. Mike Parrinello's comments about female detectives

Defendant claims that derogatory comments made by Mike Parrinello are "hearsay" and "lack foundation." (Motion p. 4:4). Again, *if* Plaintiff cannot overcome these objections at trial, then the evidence may not be admitted. However, the Court cannot decide whether a statement is hearsay before the Plaintiff has a chance to present any evidence to overcome the objection. An opposition to an MSJ does not need to contain every shred of evidence available to the Plaintiff, and any such issues, if they exist, can be rectified during witness examination.

B. So-called "context-less" statements

Defendant argues that Plaintiff must recall a time, place and speaker for every derogatory comment made to her or in her presence, or the comment would lack foundation. (Motion p. 5:16-17). This notion ignores three salient points: (1) few, if any witnesses would have a photographic

memory as to the source, time frame and context of every single comment that was made in their presence at their place of employment over a period of years; (2) at trial, witnesses other than the Plaintiff can provide additional specificity if such specificity is required; and (3) the probative value or lack thereof of so-called "context-less" statements is an issue to be resolved by the jury, not by a pre-trial motion in limine.

In *Roby v. McKesson Corp.* (2010) 47 Cal.4th 686 at 706, the California Supreme Court stated: "harassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (Emphasis added). This statement is consistent with the Court's adoption on the definition set forth by the U.S. Supreme Court that liability may arise when a workplace "is permeated with 'discriminatory [sex-based] intimidation, ridicule, and insult,' [citation], that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]' " *Lyle v. Warner Brothers Television Productions*, (2006), citing *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21. The fact that Plaintiff heard derogatory and demeaning language repeated daily or weekly in her presence at work is clearly probative of the social environment at her workplace. Should Defendant feel that Plaintiff's evidence is too vague, they are free to object or point this out – at trial.

As the Defendant admits, any perceived deficiencies in Plaintiff's evidence can be rectified at trial. Therefore, this motion is premature and should be denied in full.

C. Comments Plaintiff was not aware of are admissible to show Defendant's motive and intent

Finally, Defendant argues that comments of which Plaintiff was unaware lack foundation and are irrelevant. There are three problems with this argument: (1) Defendant assumes that Plaintiff did not hear any of the numerous comments it cites (See Motion p.8:10-10:17)[3]; (2) even if Plaintiff did not hear the comments herself "a reasonable person may be affected by knowledge that other

[3]Again, Defendant admits that this issue can be rectified at trial: "Unless Guillen can establish at trial that she was personally aware of these comments.... the Court should exclude these comments." (Motion p. 10:18-20).

workers are being.... harassed in the workplace, even if he or she does not personally witness that conduct." *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511 at 519 (See also *Miller v. Department of Corrections* (2005) 36 Cal.4th 446); and (3) even if the comments are not probative of harassment, they may still be probative of discrimination. As explained in *Roby*, supra, at 709:

> "Discrimination and harassment claims can overlap as an evidentiary matter. The critical inquiry when a court is deciding whether the evidence is sufficient to uphold a verdict finding both discrimination and harassment is whether the evidence indicates violations of both FEHA prohibitions, but nothing prevents a plaintiff from proving these two violations with the same (or overlapping) evidentiary presentations."

The instant motion entirely ignores that even comments which the Plaintiff herself was not aware can go to show the motive and intent of her employer on her discrimination claims. For example, if a witness states that they overheard Plaintiff's supervisor make derogatory comments about Hispanics, Plaintiff herself need not have witnessed that interaction to have been discriminated against by her supervisor.

Again, as Defendant admits that Plaintiff can lay a proper foundation at trial for all of the evidence it wishes to exclude here, this motion is premature and should be denied.

IV. DEFENDANT HAS FAILED TO SHOW ANY REAL PROBABILITY OF UNDUE PREJUDICE

Local Rules require the moving party to include in any motion *in limine* a "statement of the specific prejudice that will be suffered by the moving party if the motion is not granted." (Local Rule 8.92(a)(3).) Defendants motion contains no such statement of "specific prejudice." It merely, in the most conclusory terms, asserts that Burbank will be "prejudiced" should such evidence be admitted.

Defendants have thus not met their burden of showing why the evidence they seek to exclude is so prejudicial that the Court should rule on this issue now instead of ruling on evidentiary

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objections during trial. Defendants' motion should therefore be denied.

DATED: April 22, 2011

LAW OFFICES OF RHEUBAN & GRESEN

By: _____
Joseph M. Levy
Attorneys for Plaintiff, Cindy Guillen-Gomez

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On April 22, 2011, I served a copy of the following documents described as: PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 16 FOR AN ORDER EXCLUDING EVIDENCE OR ARGUMENT OF SPECIFIC COMMENTS FOR WHICH PLAINTIFF GUILLEN HAS NOT LAID A FOUNDATION on the interested parties, through their respective attorneys of record in this action as follows:

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XX **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. mail Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

XX **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. My electronic notification address is dj@rglawyers.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

XX **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 22, 2011 at Encino, California.

Daphne Johnson